

# **Exhibit 1**

1  
2 UNITED STATES DISTRICT COURT  
3 SOUTHERN DISTRICT OF NEW YORK

4 Case No. 1:15-cv-04384 (KBF)

5 -----x  
6 SMART INSURANCE COMPANY,  
7 Plaintiff,

8 -against-

9 BENECARD SERVICES, INC.,  
10 Defendant.

11 -----x

12 1221 Avenue of the Americas  
13 New York, New York

14 July 7, 2016

15 9:30 a.m.

16 VIDEOTAPED DEPOSITION of JOHN L.  
17 LEARY, taken by the Defendant, held at the  
18 aforementioned time and place, before Sherri  
19 Flagg, a Registered Professional Reporter,  
20 Certified LiveNote Reporter, and Notary Public.  
21  
22  
23  
24  
25

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1           - J. LEARY -  
2 time period between January of 2013 and the  
3 date the company was sold on August 31st, 2013,  
4 related to consultants and other professionals  
5 hired to attempt to remove sanctions imposed by  
6 CMS, and also to review information from  
7 consultants concerning claims that were  
8 improperly adjudicated during that time period.  
9     Q. My question is -- thank you for  
10 that answer. Then you do not have any opinion  
11 at all, sir, about whether Benecard or Smart or  
12 both of them or neither of them actually caused  
13 the sale or the sanctions that you were told  
14 were in place, correct?  
15     A. Please repeat the question.  
16     Q. Sure. Your opinion doesn't  
17 encompass who's liable to whom here, does it?  
18     A. No.  
19     Q. Okay. You're just providing an  
20 opinion about the valuation of Smart on a date  
21 in August of 2013, correct?  
22     MR. MEYERHOFF: Form objection.  
23     A. No.  
24     Q. Okay. That's one of the things  
25 you're providing an opinion on, right?

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1           - J. LEARY -  
2     A. Yes.  
3     Q. Okay. And you're also providing  
4 an opinion on what certain expenses were  
5 actually incurred by Smart at or about the time  
6 the plan was sold to ESI in September of 2013,  
7 correct?  
8     A. Yes.  
9     Q. Okay. And in terms of -- we can  
10 hopefully be quick on this. In terms of those  
11 expenses that you include in your report that  
12 were incurred, you accepted the information  
13 that Smart provided to you about the expenses  
14 it incurred. You didn't have to do any  
15 valuation of those expenses or any economic  
16 analysis. Smart told you that it incurred X  
17 millions of dollars in expenses; you looked at  
18 them and said: That's what they incurred.  
19 Correct?  
20     MR. MEYERHOFF: Form objection.  
21     Hopelessly compound.  
22     A. No.  
23     Q. All right. We'll get to it when  
24 we get to that part of your report.  
25     All right. Let's turn to page 3

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1           - J. LEARY -  
2 of Leary 1. And on page 3 you indicate that  
3 the -- this is -- page 3 begins with a summary  
4 of the opinions, correct?  
5     A. Yes.  
6     Q. And your answer to my question a  
7 few minutes ago was essentially the summary in  
8 an a little bit shorter version, right?  
9     MR. MEYERHOFF: Form objection.  
10     Form objection.  
11     A. I don't understand your question.  
12     Q. Okay. Well, let's go through.  
13 You have -- on page 3 you indicate that, based  
14 on the results of the analyses in your report  
15 and your education, experience and training and  
16 knowledge, your opinion is that the fair market  
17 value of Smart, as of August 31, 2013, was at  
18 least \$53.08 million higher than the proceeds  
19 received as a result of the transaction.  
20 Right?  
21     A. Correct.  
22     Q. Okay. And you further explain  
23 that you estimate the fair market value of  
24 Smart as of that date, August 31, 2013, on a  
25 marketable controlling basis to be between

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1           - J. LEARY -  
2 65.33 million and 72.57 million compared to the  
3 12.25 million that it actually received from  
4 ESI. Right?  
5     A. Yes.  
6     Q. Now, let me just ask sort of some  
7 basic questions. On August 31, 2013, how long  
8 had Smart Insurance Company been in the  
9 Medicare Part D business, sir?  
10     A. It is my recollection that the  
11 contract was awarded sometime in September of  
12 2012. So it went through open enrollment and  
13 that it first enrolled its members beginning  
14 January 1, 2013.  
15     Q. Do you recall, from doing all of  
16 your analysis--and there's a lot of it in this  
17 report, we'll get to it--how much Smart  
18 Insurance Company -- what the profit of Smart  
19 Insurance Company in 2012 was?  
20     A. I don't recall specific number but  
21 it was in the loss position.  
22     Q. Okay. And do you recall, for the  
23 period from January 1, 2013, to August 31,  
24 2013, how much profit Smart had earned at that  
25 time, during that period of time?

22 (Pages 82 - 85)

<p style="text-align: right;">Page 86</p> <p>1 - J. LEARY -</p> <p>2 A. During that period of time, they</p> <p>3 were also incurring losses.</p> <p>4 Q. Okay. And then for the whole</p> <p>5 calendar year of 2013, can you tell me, to the</p> <p>6 best of your recollection, what the profit of</p> <p>7 Smart Insurance Company was?</p> <p>8 A. I don't recall what the 2013</p> <p>9 financial statements -- I recall looking at the</p> <p>10 -- a full year for 2013, but I don't recall</p> <p>11 what the losses or profits were.</p> <p>12 Q. Okay. But there were no profits;</p> <p>13 there were losses, right?</p> <p>14 MR. MEYERHOFF: Form objection.</p> <p>15 A. I don't recall.</p> <p>16 Q. Can you tell me, in this</p> <p>17 30-some-page report with a number of</p> <p>18 appendices, where I can find the information I</p> <p>19 just asked you, that is, the amount of profits</p> <p>20 or losses that Smart incurred between January</p> <p>21 1, 2012, and August 31, 2013?</p> <p>22 MR. MEYERHOFF: Form objection.</p> <p>23 A. Historical balance sheet data --</p> <p>24 Q. Can you give me -- is it an</p> <p>25 appendix?</p>	<p style="text-align: right;">Page 88</p> <p>1 - J. LEARY -</p> <p>2 Q. Do you understand my question,</p> <p>3 sir?</p> <p>4 A. I'd like for you to repeat it.</p> <p>5 Q. I can repeat it. Let me ask it</p> <p>6 this way: What does that \$15,694,934 figure --</p> <p>7 what does that represent, sir?</p> <p>8 A. That would be the cumulative</p> <p>9 losses.</p> <p>10 Q. And as you testified a few minutes</p> <p>11 ago, your understanding was that Smart</p> <p>12 commenced this business on or about 2012,</p> <p>13 correct?</p> <p>14 A. That's when they began their CMS</p> <p>15 contract. I believe the company was formed</p> <p>16 before that time.</p> <p>17 Q. Okay. And then on E-2, the</p> <p>18 historical income statement, there's an</p> <p>19 indication that the EBITDA, that's</p> <p>20 E-B-I-T-D-A -- and can you just explain what</p> <p>21 that EBITDA means?</p> <p>22 A. It's earning before interest,</p> <p>23 taxes, depreciation and amortization.</p> <p>24 Q. And you rely upon EBITDA</p> <p>25 calculations in your report of some of the</p>
<p style="text-align: right;">Page 87</p> <p>1 - J. LEARY -</p> <p>2 A. It's my report Exhibit E-1.</p> <p>3 Q. Just give me a second so I can get</p> <p>4 there, please. Okay, I'm on E-1.</p> <p>5 A. E-1 shows the balance sheet as of</p> <p>6 December 31st, 2013.</p> <p>7 Q. Okay. I'm looking at the</p> <p>8 historical balance sheet. Can you tell me</p> <p>9 where on this sheet it tells me the number of</p> <p>10 the profit or loss for Smart Insurance Company</p> <p>11 for the calendar year 2013?</p> <p>12 A. Well, this is the balance sheet.</p> <p>13 It shows unassigned surplus or deficit of 15.6</p> <p>14 or 15.7 million. On the next page, the</p> <p>15 historical income statement, shows income for</p> <p>16 fiscal year ended December 31st. And this</p> <p>17 shows a loss of 2,845,519.</p> <p>18 Q. Okay. So the unassigned deficit,</p> <p>19 because it's a negative number on the balance</p> <p>20 sheet E-1, is 15,694,934?</p> <p>21 A. Right.</p> <p>22 Q. And does that represent the total</p> <p>23 losses for the company from 2012 through 2013?</p> <p>24 MR. MEYERHOFF: Form objection.</p> <p>25 What do you mean from 2012?</p>	<p style="text-align: right;">Page 89</p> <p>1 - J. LEARY -</p> <p>2 comparable -- allegedly comparable companies,</p> <p>3 right?</p> <p>4 A. Yes.</p> <p>5 Q. EBITDA's an important component</p> <p>6 when you're doing a business valuation, isn't</p> <p>7 it?</p> <p>8 MR. MEYERHOFF: Form objection.</p> <p>9 A. Yes.</p> <p>10 Q. Okay. And the EBITDA for Smart,</p> <p>11 as indicated on Exhibit E-2 to your report,</p> <p>12 indicates that it was a negative \$20,331,492.</p> <p>13 Correct?</p> <p>14 A. Correct.</p> <p>15 Q. Now, below the EBITDA there's a</p> <p>16 line item indicating write-ins. What does that</p> <p>17 represent, sir?</p> <p>18 A. That represents the -- there was a</p> <p>19 gain, as I recall, on the sale of the company</p> <p>20 that resulted in an entry for a write-in of</p> <p>21 17.47 million.</p> <p>22 Q. So even with that -- when you say</p> <p>23 a gain on the sale of a company, there was a</p> <p>24 gain as a result of the sale to ESI on</p> <p>25 September 1, 2013, of 17 million?</p>

23 (Pages 86 - 89)

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1  
2 CERTIFICATION  
3

4 I, Sherri Flagg, a Professional  
5 Reporter, Certified LiveNote Reporter, and a  
6 Notary Public, do hereby certify that the  
7 foregoing witness, JOHN L. LEARY, was duly  
8 sworn on the date indicated and that the  
9 foregoing is a true and accurate transcription  
10 of my stenographic notes.

11 I further certify that I am not  
12 employed by nor related to any party to this  
13 action.

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15

16 Sherri Flagg, CLR  
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1 ERRATA SHEET  
2 VERITEXT LEGAL SOLUTIONS  
3 330 OLD COUNTRY ROAD  
4 MINEOLA, NY 11501  
5 800.727.6396

6 CASE: SMART VS. BENECARD

7 DEPOSITION DATE: 7/7/2016

8 DEPONENT: JOHN L. LEARY

9 PAGE LINE(S) CHANGE REASON

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18			
19			
20			

21 JOHN L. LEARY

22 SUBSCRIBED AND SWORN TO BEFORE ME

23 THIS \_\_\_\_ DAY OF \_\_\_\_\_, 20\_\_.

24

25 (NOTARY PUBLIC) MY COMMISSION EXPIRES:

80 (Pages 314 - 315)